Tenaga Nasional Bhd v Pearl Island Resort Development Sdn Bhd (previously known as 'PPH Resorts (Penang) Sdn Bhd')

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)(W)-897–04 OF 2013
ZAHARAH IBRAHIM, MOHAMAD ARIFF AND DAVID WONG JJCA
13 JANUARY 2015

Limitation — Postponement of limitation period — Part payment of debt — Whether bank's payment to creditor of sum payable under bank guarantee taken out by debtor could be construed as part payment of debt postponing limitation period — Whether part payment had to be made by debtor personally or by his authorised agent — Whether bank was not debtor's agent when it made payment pursuant to call on bank guarantee — Whether such payment could not revive right of action to recover debt under s 26(2) of the Limitation Act 1953

The appellant sued the respondent in the High Court for monies owing for supply of electricity to the respondent's premises. The contract between the parties allowed the appellant to charge connected load charges ('CLC charges') if the respondent's usage fell below 75% of a maximum load it had requested. The respondent's default in paying for the electricity supplied saw the parties entering into a deed of settlement under which the respondent agreed to an instalment-payment scheme to settle both the arrears and current charges. When the respondent defaulted after the third instalment payment, the appellant disconnected electricity supply in October 2005 and demanded payment of all monies owing. The appellant called on a RM80,000 bank guarantee the respondent had secured in favour of the appellant guaranteeing payment of the electricity charges and that sum was paid to the appellant on 31 May 2006. After taking into account other deposits lodged by the respondent, the appellant filed the action for the balance sum owing in February 2012. The respondent argued that the appellant's claim was time barred under s 6(1)(a) of the Limitation Act 1953 ('Act'); that it contravened the Licensee Supply Regulations 1990 ('LSR') when it disconnected electricity supply to the respondent's premises and that the deed of settlement was null and void as the appellant was not empowered under the Electricity Supply Act 1990 ('ESA') to include CLC charges in the arrears demanded. The respondent counterclaimed for, inter alia, repayment of the bank guarantee amount, the deposits and the instalments paid under the deed of settlement as well as costs the respondent had incurred to generate electricity following the disconnection of the electricity supply. The High Court dismissed the appellant's claim on the ground it was time barred. It held the encashment of the bank guarantee could not be construed as a part payment of the debt made by the respondent to bring the matter within s 26(2) of the Act as the bank guarantee was a separate and

independent contract between the appellant and the bank under which the latter had to pay when a demand was made. The High Court also dismissed the counterclaim on the ground the imposition of the CLC charges in the deed of settlement was not ultra vires the ESA and that the respondent had in any event agreed to it and was estopped from taking a contrary stand afterwards. The High Court held the disconnection of electricity to the respondent's premises was lawfully done with prior notice under the LSR. In the instant appeal by both parties against the respective decisions of the High Court, the appellant argued that for purposes of limitation, time ran from the date the appellant received the bank guarantee amount on 31 May 2006 and not the date the respondent defaulted under the deed of settlement and that part payment for the purposes of s 26(2) of the Act need not be made by the respondent itself but could be made by another party, such as the bank in the instant case.

Held, dismissing the appeal and the cross-appeal:

(1) Part payment (in respect of a debt) must be made by the defendant himself or by his authorised agent. In the instant case, the bank could not be equated in law as an agent of the respondent in relation to the payment on the call on the bank guarantee (see para 20).

(2) The High Court rightly dismissed both the claim and the counterclaim. It had correctly analysed the facts and the law. There was no error whether of law or in the evaluation of evidence to warrant appellate intervention (see para 21).

[Bahasa Malaysia summary

Perayu telah menyaman responden di Mahkamah Tinggi untuk wang yang terhutang bagi bekalan elektrik ke premis responden. Kontrak antara pihak-pihak membenarkan perayu untuk mengenakan caj muatan bersambung ('caj-caj MB') jika penggunaan responden kurang daripada 75% daripada muatan maksimum yang telah dimintanya. Kegagalan responden dalam membayar elektrik yang dibekalkan melihat pihak-pihak yang memasuki surat ikatan penyelesaian di mana responden bersetuju dengan skim bayaran ansuran untuk menyelesaikan kedua-dua tunggakan dan caj-caj semasa. Apabila responden gagal selepas bayaran ansuran ketiga, perayu telah memotong bekalan elektrik dalam bulan Oktober 2005 dan menuntut bayaran kesemua wang yang terhutang. Perayu telah meminta jaminan bank sejumlah RM80,000 yang telah diperolehi menyebelahi perayu yang menjamin bayaran caj-caj elektrik dan bahawa jumlah tersebut telah dibayar kepada perayu pada 31 Mei 2006. Setelah mengambil kira deposit-deposit lain yang dibuat oleh responden, perayu telah memfailkan tindakan untuk jumlah baki terhutang dalam bulan Februari 2012. Responden telah berhujah bahawa tuntutan perayu telah luput had masa di bawa s 6(1)(a) Akta Had Masa 1953 ('Akta'); bahawa ia bertentangan dengan Peraturan Bekalan Pemegang Lesen 1990 ('PBPL') apabila ia memotong bekalan elektrik ke premis responden dan

bahawa surat ikatan penyelesaian adalah terbatal dan tidak sah kerana perayu tidak diberi kuasa di bawah Akta Bekalan Elektrik 1990 ('ABE') untuk memasukkan tunggakan caj-caj MB yang dituntut. Responden telah menuntut balas untuk, antara lain, bayaran semula jumlah jaminan bank, deposit-deposit dan bayaran ansuran yang dibayar di bawah surat ikatan penyelesaian dan juga kos responden yang telah terakru untuk menjana elektrik berikutan pemotongan bekalan elektrik. Mahkamah Tinggi telah menolak tuntutan perayu atas alasan ia telah luput had masa. Ia memutuskan penunaian jaminan bank tidak boleh ditafsirkan sebagai sebahagian bayaran hutang yang dibuat oleh responden untuk membawa perkara itu dalam skop s 26)(2) Akta kerana jaminan bank adalah kontrak berasingan dan bebas antara perayu dan bank di mana bank perlu membayar apabila tuntutan dibuat. Mahkamah Tinggi juga menolak tuntutan balas atas alasan pengenaan caj-cah MB dalam surat ikatan penyelesaian tidak ultra vires ABE dan bahawa responden telah dalam apa keadaan bersetuju dengannya dan diestop daripada membuat pendirian bertentangan kemudian. Mahkamah Tinggi memutuskan pemotongan elektrik ke premis responden telah dilakukan dengan sah dengan notis terdahulu di bawah PBPL. Dalam rayuan ini oleh kedua-dua pihak terhadap keputusan Mahkamah Tinggi masing-masing, perayu berhujah bahawa bagi tujuan had masa, masa bermula dari tarikh perayu menerima jumlah jaminan bank pada 31 Mei 2006 dan bukan tarikh kegagalan responden di bawah surat ikatan penyelesaian dan bahawa sebahagian bayaran bagi tujuan s 26(2) Akta tidak perlu dibuat oeh responden sendiri tetapi boleh dibuat oleh pohak lain, seperti bank dalam kes ini.

Diputuskan, menolak rayuan dan rayuan balas:

(1) Sebahagian bayaran (berkaitan hutang) perlu dibuat oleh defendan sendiri atau oleh ejennya yang diberi kuasa. Dalam kes ini, bank tidak boleh disamakan di sisi undang-undang sebagai ejen responden berkenaan bayaran atas panggilan ke atas jaminan bank (lihat perenggan 20).

(2) Mahkamah Tinggi telah menolak dengan sewajarnya kedua-dua tuntutan dan tuntutan balas. Tiada kesilapan sama ada dari segi undang-undang atau dalam penilaian keterangan untuk mewajarkan campur tangan pihak rayuan (lihat perenggan 21).]

Notes

For a case on part payment of debt, see 9 *Mallal's Digest* (4th Ed, 2014 Reissue) para 2478.

Cases referred to

Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] QB 84, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd

[1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Malaysia Building Society Berhad v KL Al Dhuha Sdn Bhd & Anor [2011] 1 LNS 791, HC (distd)
WTK Holdings Bhd v Foo Sae Heng & Anor [2011] 5 CLJ 433, CA (refd)

Legislation referred to

Electricity Supply Act 1990 ss 26, 26A, 29(1), (2)
Evidence Act 1950 s 114(g)
Licensee Supply Regulations 1990
Limitation Act 1953 s 6(1)(a), 26(2)

Appeal from: Civil Suit No 22NCvC-167–02 of 2012 (High Court, Penang)

Mah Su-Ling (Shahrizat Rashid & Lee) for the appellant.
JJ Chan (Shearn Delamore & Co) for the respondent.

Mohamad Ariff JCA:

[1] This was an appeal against the decision of the High Court in Penang which dismissed the claim by Tenaga Nasional Bhd ('the appellant') for outstanding sums due from Pearl Island Resort Development Sdn Bhd ('the respondent') arising a contract to supply electricity dated 6 June 2001 ('the contract') entered into between the appellant and the respondent for the supply of electricity to the respondent's premises, a club and golf course known as Lot 8134, Jalan Relau, Bayan Lepas, Pulau Pinang.

[2] The contract was entered into pursuant to an application for supply of electricity dated 4 January 2001 by the respondent for electricity to be supplied at the respondent's premise, and in this application the respondent had requested that it be supplied with a maximum load of 2270 kW. This request for the supply of the maximum load was incorporated into the contract. By this contract, the respondent was to pay the monthly connected load charges ('the CLC charges') if the maximum load recorded was less than 75% of the declared load of 2270 kW at the rate of RM8.50 kW.

[3] The respondent defaulted in settling the charges for electricity consumed at the premises. It wrote to the appellant to request for indulgence to pay the charges outstanding (without CLC charges) by 12 monthly instalments. This letter dated 16 August 2004 appears on p 87, Vol 2, appeal record. A deed of settlement was then entered into on 10 June 2005, whereby the respondent agreed to:

(a) settle the admitted arrears of payments then due and owing to the appellant amounting to RM463,334.08, by ten equal monthly instalments commencing 24 June 2005; and

(b) with effect from 24 September 2005, to also settle the current monthly electricity charges incurred by the respondent, together with the instalments.

[4] The arrears and the current charges outstanding included the CLC charges as well.

[5] The schedule of payment in the deed of settlement provided as follows:

Payment	Date	Arrears Payment	Current Month
1	24 June 2005	25,000	0
2	24 July 2005	25,000	0
3	24 August 2005	25,000	0
4	24 September 2005	55,500	In Full
5	24 October 2005	55,500	In Full
6	24 November 2005	55,500	In Full
7	24 December 2005	55,500	In Full
8	24 January 2006	55,500	In Full
9	24 February 2006	55,500	In Full
10	24 March 2006	55,334.08	In Full
	Total	463,334.08	

[6] The respondent only paid a total sum of RM75,000 for the months of June–August 2005 and thereafter defaulted in making payments as agreed. Consequently, the supply of electricity to the respondent's premises was disconnected on 5 October 2005, after the respondent failed to comply with the appellant's letter dated 21 September 2005 that demanded the respondent settle the accumulated unpaid arrears and current payments which stood at RM531,473.06 as at 21 September 2005, and the subsequent notice to disconnect dated 24 September 2005. The notice to disconnect gave the respondent notice to make payment of an adjusted outstanding sum of RM576,103.76 within 30 days. The respondent did not settle the instalment for 24 September 2005, and its earlier request that it be exempted from paying the CLC charges was rejected by the appellant in the appellant's very same letter dated 21 September 2005.

[7] The respondent had secured a bank guarantee from Eon Bank Bhd for the sum of RM80,000 to guarantee the payment of electricity charges as part of the agreement to supply the electricity to the respondent's premises. The appellant made a call on this bank guarantee on 14 February 2006, and the sum of RM80,000 was then credited into the respondent's account with the

appellant on 31 May 2005, leaving an outstanding amount of RM527,276.86 as due and payable.

[8] A notice of demand for the outstanding amount was issued on 30 July 2008 to the respondent. When the respondent failed to respond, the appellant then utilised the deposit of RM13,219.47 and RM3,310.22 from the other accounts of the respondent, leaving a total outstanding amount due and owing by the respondent to the appellant of RM510,747.17. That was the amount claimed by the appellant in this suit.

[9] The appellant instituted this action on 28 February 2012. The respondent argued the appellant's claim was statute barred as it had been filed after the expiry of 6 years applicable for contractual claims under s 6(1)(a) of the Limitation Act 1953. It was also alleged by the respondent that the appellant had acted wrongfully and in contravention of the relevant regulations (the Licensee Supply Regulations 1990) by disconnecting the electricity to the premises and that the deed of settlement entered into was null and void, being ultra vires the powers of the appellant under the Electricity Supply Act 1990 ('Act 447') when it imposed the 'connected load charges' which had been included in the computation of the arrears.

[10] The respondent filed a counterclaim against the appellant claiming, inter alia:

(a) refund of the instalments of RM75,000;

(b) the repayment of the sum of RM80,000 under the bank guarantee which the respondent claimed to have been wrongfully demanded upon and received by the appellant;

(c) RM16,529.69 being the deposit sum alleged to have been wrongfully appropriated by the appellant;

(d) a sum of RM75,000 alleged to be the costs of operating and maintaining an alternative generator for supply of electricity to the premises allegedly incurred by the respondent, after the electricity supply to the premises was disconnected by the appellant;

(e) refund of RM150,000 being a further deposit paid by the respondent to the appellant on 6 June 2001 for obtaining connection of electricity supply to the premises; and

(f) interest.

[11] The learned High Court judge dismissed both the appellant's claim and the respondent's counterclaim with costs to be borne by each party. In dismissing the appellant's claim in the High Court, the trial judge agreed with

A the contention of the respondent that the claim was barred by limitation, but dismissed the counterclaim as being without merits.

[12] The appellant had argued that the period of limitation should be calculated from the date the call on the bank guarantee was made and the B monies credited, namely 31 May 2006, and not the date of default under the settlement agreement — 23 October 2005 — being the last day following the giving of the 30 days' notice to settle the outstanding sums by the letter of 24 September 2005 ('Notis Pemotongan Bekalan Elektrik'). The appellant relied on s 26(2) of the Limitation Act 1953, reading: C

> (2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable accountable therefore acknowledges the claim *or makes any payment in respect thereof*, the right shall be deemed to have D accrued on and not before the date of the acknowledgment or the last payment ... (Emphasis added.)

[13] The learned trial judge limited the application of this provision to situations where the 'part payment' was made by the defendant itself, not by E virtue of a call on the bank guarantee, holding:

> After having given anxious consideration to the submission of plaintiff's counsel, I was of the view that s 26(2) was of no assistance to the plaintiff in the circumstances obtaining here in this case. The monies pursuant to the encashment of the bank guarantee did not come from the defendant (person liable or accountable for the F debt). It was trite that a bank guarantee of the nature here ... was a separate and independent contract between the plaintiff and the bank only and as provided therein the bank was to pay within seven days of receipt of the relevant notice of default. The plaintiff was entitled to enforce this contract of guarantee (or indemnity, in a sense) without reference to the defendant ... (at pp 32–33 of the G grounds of judgment).

[14] As regards the arguments taken on the counterclaim, the trial judge applied the doctrine of estoppel against the respondent (drawing on the principles laid down in *Amalgamated Investment and Property Co Ltd (in* H *liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84, as applied by our Federal Court in the oft-cited case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283) on the basis that the respondent had voluntarily entered into the settlement agreement and it could not now be seen as resiling from the position I that it had agreed and had led the appellant to believe that it would settle the amounts to the appellant due inclusive of the CLC by the agreed instalments, which it now argued at trial as being ultra vires and void on the ground that s 26 of the Electricity Supply Act 1990 did not confer any power on the appellant to impose and compel its customers to pay CLC. The CLC effectively allowed the

appellant to charge the respondent for electricity not actually utilised, whereas it could only impose a surcharge for late payments under s 26A of the same Act. The trial judge emphasised that the respondent overlooked s 29(1) and (2) of the Act which qualified s 26 and 26A by expressly providing that there could be a special agreement entered into whereby the rights and obligations of the parties would be governed by this special agreement. The imposition of the CLC therefore was not ultra vires the Electricity Supply Act 1990.

[15] The CLC, according to the finding of the trial judge, was not unilaterally imposed but was agreed to by the respondent. The respondent failed to call one Tan Swee Leong who was potentially a crucial witness for the respondent since he signed the settlement agreement on behalf of the respondent. An adverse inference under s 114(g) was drawn against the respondent for this failure to call a crucial witness who could have either confirmed or denied whether the imposition of the CLC was agreed by the respondent.

[16] The respondent also questioned the accuracy of the outstanding charges, but this point merely taken generally and it did not show the particulars of any manifest error to the court. The learned trial judge stated:

> The defendant, apart from merely asserting that they have not been provided with particulars of the sum claimed, failed to show how the calculations of the sum claimed by the plaintiff was erroneous. It was always open to the defendant to attend at the office of the plaintiff to obtain the necessary details and not make a sweeping allegation that they had sought for but had not been provided with the details (at p 28 of the judgment).

[17] In these circumstances, the disconnection of the electricity supply to the respondent's premises was lawfully effected with prior notice under the Licensee Supply Regulations 1990.

[18] In the submission before us in the appeal, the respondent revisited these arguments in its cross-appeal. The appellant, on the other hand, limited its grounds to the issue of limitation, which it advanced as follows:

(i) did the encashment of the Bank Guarantee by the appellant on 31.5.2006 amount to a part-payment under s. 26(2) Limitation Act 1953, therefore giving rise to a fresh accrual of action; and

(ii) did the Appellant's 'delay' in encashing the Bank Guarantee prevent the operation of s. 26(2) Limitation Act 1953.

Although formulated as two grounds, it was evident that a negative answer to ground (i) would effectively settle ground (ii).

[19] In the course of the submissions before us, counsel for the appellant cited two case authorities to support the appellant's contention that the part payment did not need to be made by the respondent itself, but could be made by another party, such as the bank on the facts of this appeal when it honoured the call on the bank guarantee resulting in the offsetting of the amount payable by RM80,000 on 31 May 2006 when the amount was paid into the respondent's account. Since the plaintiff's/appellant's action was filed on 27 February 2012, it was not barred by limitation. The two case authorities are *Malaysia Building Society Berhad v KL Al Dhuha Sdn Bhd & Anor* [2011] 1 LNS 791 (a case heard by me as a High Court judge) and *WTK Holdings Bhd v Foo Sae Heng & Anor* [2011] 5 CLJ 433. We were not persuaded any of these cases supported the appellant's contention. In *Malaysia Building Society Berhad v KL Al Dhuha Sdn Bhd & Anor*, which concerned a default of payment on a loan, the borrower had actually agreed with the plaintiff (the lender) that it would allow a sum of RM1m to be utilised by the lender to offset the amount outstanding when the sum was received from Jabatan Alam Sekitar as consideration for an acquisition of part of the charged property. The borrower agreed to allow the lender to receive that sum directly from Jabatan Alam Sekitar for this purpose. The loan had been in default since November 2001. The part payment was made in January 2008. The suit for recovery of the loan was filed in 2010. There was an element of acknowledgement of the debt by the borrower after the expiry of the six years from the accrual of cause of action in addition to the agreement to allow the acquisition sum to be paid directly to the plaintiff to offset the loan. These elements are absent on the facts of this instant appeal, and therefore *Malaysia Building Society Berhad v KL Al Dhuha Sdn Bhd & Anor*, is distinguishable on the facts, and is not an authority for a broad proposition of law that a part payment can be made by any third party for s 26(2) of the Limitation Act to apply.

[20] As for *WTK Holdings Bhd v Foo Sae Heng & Anor*, the facts disclose that the part payment was made by an associate company of the borrower. The Court of Appeal in fact decided that s 26(2) could not apply because it was not established on the evidence that the associate company had acted as an agent of the borrower when it paid the lender. Thus, if anything this case is an authority for the proposition that part payment must be made by the defendant himself or by his authorised agent. The bank, on the facts of this instant appeal, could not, in our view, be equated in law as an agent of the respondent in relation to the payment on the call on the bank guarantee.

[21] Having considered the grounds of judgment of the learned trial judge and considered the submissions of counsel before us, particularly in light of the two case authorities referred to earlier, we could not find any appealable error to warrant our intervention. In His Lordship's meticulous judgment, the facts and the law had been correctly analysed. There was no clear error whether of

law or in the evaluation of the evidence that warranted any appellate intervention. The High Court was thus correct to dismiss both the plaintiff's claim and the defendant's counterclaim.

[22] Thus, for the reasons analysed above, we were of the unanimous opinion that both the appeal and the cross-appeal should be dismissed. That being so, we further decided that there be no order as to costs. The deposit was ordered to be refunded to the appellant.

Appeal and the cross-appeal dismissed.

Reported by Ashok Kumar